

FEDERAL CIRCUIT COURT OF AUSTRALIA

CHOPRA v MINISTER FOR IMMIGRATION & ANOR [2014] FCCA 2064

Catchwords:

MIGRATION – Review of Migration Review Tribunal decision – refusal of a skilled visa – English language test results relied upon by the applicant found to have been fabricated and to be a “bogus document” – no jurisdictional error.

Legislation:

Migration Act 1958 (Cth), ss.359A, 359AA

Migration Regulations

Cases cited:

SZMCD v Minister for Immigration (2009) 174 FCR 415

Trivedi v Minister for Immigration [2014] FCAFC 42

Vyas v Minister for Immigration & Anor [2012] FMCA 92 at [7]

Applicant:	SATBIR CHOPRA
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 2929 of 2013
Judgment of:	Judge Driver
Hearing date:	5 September 2014
Delivered at:	Sydney
Delivered on:	5 September 2014

REPRESENTATION

The Applicant appeared in person

Counsel for the Respondents: Mr M J Smith

Solicitors for the Respondents: DLA Piper

ORDERS

- (1) The application filed on 26 November 2013 is dismissed.
- (2) The applicant is to pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of \$4,900.
- (i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 2929 of 2013

SATBIR CHOPRA

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. This is an application to review a decision of the Migration Review Tribunal (Tribunal). The decision was made on 30 October 2013. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant (Mr Chopra) a Skilled (Provisional) (Class VC) visa.
2. Background facts relating to the visa application and the decision of the Tribunal on it are conveniently set out in the Minister's outline of written submissions, filed on 19 August 2014. The following statement of background facts is derived from those written submissions.

3. On 2 September 2010, Mr Chopra made an application for a subclass 485 (Skilled Graduate (Temporary) Class VC)) visa¹. In order to be granted the visa that was sought by Mr Chopra, it was necessary for the applicant to satisfy the Tribunal that he had competent English². The applicant provided an International English Language Testing System (IELTS) report of 24 June 2009 to the Minister's Department to attempt to demonstrate that he had competent English³.
4. In order to be granted the visa which was sought, Mr Chopra was also required to satisfy the requirements of clause 485.224 of Schedule 2 to the Regulations, which provided that the applicant is required to satisfy, relevantly, public interest criterion 4020 (PIC 4020)⁴. PIC 4020 provides as follows:
 - (1) *There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:*
 - (a) *the application for the visa; or*
 - (b) *a visa that the applicant held in the period of 12 months before the application was made.*
 - (2) *The Minister is satisfied that during the period:*
 - (a) *starting 3 years before the application was made; and*
 - (b) *ending when the Minister makes a decision to grant or refuse the application;**the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).*
 - (3) *To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or*

¹ Court Book (CB) 1

² clause 485.215 of Schedule 2 to the *Migration Regulations 1994* (Cth) (Regulations)

³ CB 18-19

⁴ PIC 4020 is found in clause 4020 in Part 1 of Schedule 4 to the Migration Regulations.

information that is false or misleading in a material particular because of information given by the applicant.

(4) *The Minister may waive the requirements of any or all of paragraphs (1) (a) or (b) and subclause (2) if satisfied that:*

(a) *compelling circumstances that affect the interests of Australia; or*

(b) *compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;*

(5) *In this clause:*

information that is false or misleading in a material particular means information that is:

(a) *false or misleading at the time it is given; and*

(b) *relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.*

5. In *Trivedi v Minister for Immigration*⁵, Buchanan J (with whom Allsop CJ and Rangiah J agreed) held that in order for a statement to be false within the meaning of PIC 4020 it must have been made on a deliberately false basis by somebody, although that somebody need not be the visa applicant and, moreover, it is not necessary for the visa applicant to have been aware that the information is “purposely untrue”.
6. On 24 January 2013, the Minister’s delegate refused to grant Mr Chopra the visa he sought on the basis that Mr Chopra did not meet PIC 4020 as he had provided a bogus document to the Minister’s Department as part of his visa application. The bogus document in question was that IELTS report of 24 June 2009 (IELTS Certificate).
7. On 8 February 2013, Mr Chopra applied⁶ to have the delegate’s decision reviewed by the Tribunal and, on 30 October 2013, following a hearing that took place on 14 August 2013, the Tribunal affirmed the

⁵[2014] FCAFC 42

⁶CB 43

delegate's decision⁷. The Tribunal found that the IELTS Certificate, which Mr Chopra had provided as part of his visa application, was a bogus document.

8. At the hearing before the Tribunal, Mr Chopra gave evidence that he sat the IELTS test on 13 June 2009 and received the results in the IELTS Certificate on 24 June 2009. Mr Chopra claimed that he had sought and obtained a remark and received a new certificate (which was backdated to 24 June 2009) which had been provided as part of his visa application⁸.
9. The Tribunal's reasons reveal it conducted its own inquiries and sought to verify the IELTS Certificate that Mr Chopra provided to the Department. The IELTS electronic records that were searched indicated that Mr Chopra had undertaken an IELTS test on 13 June 2009 and achieved results that were not consistent with the results specified on the IELTS Certificate provided by Mr Chopra to the Department. The Tribunal considered the electronic records to be "probative" and "persuasive" and found that it was highly unlikely that the IELTS records would not have been updated if Mr Chopra obtained different scores following a re-mark. The Tribunal also found that it was highly unlikely that the IELTS authority would have issued a new certificate following a remark and backdated it an earlier date which was prior to the re-mark⁹.
10. The Tribunal did not accept that Mr Chopra applied for a re-mark at the end of June 2009 and received the results two weeks later. The Tribunal did not accept that Mr Chopra received a new IELTS report form which was backdated to 24 June 2009. Based on these findings, the Tribunal concluded that the IELTS Certificate was a bogus document and, given that Mr Chopra had provided it as part of his application, Mr Chopra did not meet PIC 4020¹⁰. The Tribunal also concluded that there was no basis to waive the requirements of PIC 4020(1)(a)¹¹.

⁷CB 90-95

⁸CB 92 [10]

⁹ CB 92 [9]-[12]

¹⁰CB 92-93 [13]-[14]

¹¹CB 93 [17]-[18]

11. These proceedings began with a show cause application filed on 26 November 2013.

12. Mr Chopra continues to rely upon that application. It contains two grounds:

1. *The Tribunal committed jurisdictional error in that:*
 - a. *The reason relied upon by it to reject the veracity of the IELTS certificate provided by the Applicant was its concern regarding the Applicant's credibility;*
 - b. *Such a method of reasoning can only be adopted to reject documents where an applicant's claims have been discredited by comprehensive findings of dishonesty or untruthfulness, whereas the Tribunal's findings in respect of the Applicant's claims:*
 - i. *Were not comprehensive*
 - ii. *Did not amount to a finding of dishonesty or untruthfulness*
2. *The Tribunal failed to comply with section 359A(1)(a) of the Migration Act.*

Particulars

- a. *Failure to give clear particulars of information that was said to indicate that the applicant obtained IELTS test results which were different from the results that were submitted in support of the visa application.*
 - b. *Failure to fully and accurately disclose particulars of the information that was said to indicate that the applicant obtained IELTS test results which were different from the result that were submitted in support of the visa application.*
13. I have before me as evidence the court book filed on 9 January 2014. Only the Minister has prepared written submissions in accordance with directions I gave on 9 December 2013.
14. The matter was listed for hearing on 27 August 2014 on a final basis. At that time, Mr Chopra failed to attend, but the Court was successful in contacting him by telephone. He reported that he was too sick to

attend, and I made orders giving him the opportunity to submit a medical certificate verifying his unfitness to attend court, in which case, the matter would be adjourned to today. Mr Chopra complied with that order and appeared today in person and made oral submissions.

15. Mr Chopra is concerned that he was denied a visa even though he was not personally at fault in providing a document which was found to be a bogus document. He is concerned that he did not understand the relevant principles and these were not adequately explained to him. There has been no finding that Mr Chopra was personally involved in producing the bogus document in issue.
16. The grounds raised in the application are unsustainable. The first ground raises a legal principle which is certainly arguable on its face, but does not accord with the facts of this case. I agree with, and adopt the Minister's submissions on that ground.
17. Mr Chopra contends that the Tribunal fell into jurisdictional error because it found that the IELTS Certificate was a bogus document based on an assessment of Mr Chopra's credibility, in circumstances where comprehensive findings about Mr Chopra's credibility had not been made by the Tribunal.
18. Mr Chopra's allegation is based on a misreading of the Tribunal's reasons. It is plain that the Tribunal concluded that the IELTS Certificate was a bogus document based on an assessment of the objective evidence that was available to it and which was at odds with the oral evidence given by Mr Chopra at the hearing.
19. Mr Chopra claimed that he sought a re-mark of the IELTS Certificate and that the IELTS Certificate he received following such re-mark bore the date 24 June 2009. As its reasons record, the Tribunal undertook inquiries of its own and found that the records of the "IELTS Online Verification System" which indicated that Mr Chopra had undertaken an IELTS test on 13 June 2009 and received a score different to that stated on the IELTS Certificate Mr Chopra had provided to the Tribunal. The Tribunal considered the record of the IELTS authority to be "probative and persuasive" and did not accept Mr Chopra's

evidence that the IELTS Certificate indicated the result Mr Chopra had received following a re-mark.

20. Likewise, the second ground to review must be rejected. In terms of any issue of the fairness of the hearing opportunity afforded Mr Chopra, there is no doubt that he was on notice of the essential and significant issue upon which the review would turn from the delegate's decision.
21. The delegate also went through a process of disclosure in relation to the inconsistency between the purported certificate of Mr Chopra's IELTS results and the information obtained from the testing centre in the United Kingdom. The information (being discrepancies in the IELTS results) was referred to in the reasons of the delegate, which Mr Chopra provided to the Tribunal¹². It was therefore unnecessary for such discrepancies to be put to Mr Chopra for his comment or consideration¹³. Further, it is clear from [11] of the Tribunal's decision¹⁴, that the Tribunal in any event complied with its obligation of disclosure pursuant to s.359A of the *Migration Act 1958* (Cth) (Migration Act) by disclosing the relevant information orally at the Tribunal hearing.
22. It is apparent from the Tribunal's reasons that the Tribunal put to Mr Chopra the particulars of the information orally under s.359AA¹⁵, thus obviating the need to put the particulars of the information in writing under s.359A¹⁶.
23. I have, in addition, considered whether it is arguable that the Tribunal erred by relying on my decision in *Vyas v Minister for Immigration & Anor*¹⁷ of its reasons in order to support its conclusion that it did not matter whether Mr Chopra supplied the bogus document knowingly or unwittingly. That decision has been qualified by the recent decision of the Full Court of the Federal Court in *Trivedi*.

¹²CB 61-62

¹³Section 359A(4)(b)

¹⁴CB 92

¹⁵CB 92 [11]

¹⁶*SZMCD v Minister for Immigration* (2009) 174 FCR 415 at [2] per Moore J; at [77] per Tracey and Foster JJ

¹⁷[2012] FMCA 92 at [7]

24. As is noted in the Minister's submissions, the relevant principles in that case can be drawn from [54] of the judgment of Buchanan J with whom the other members of the Court agreed:

In summary, I conclude that:

0 PIC 4020(1) refers to information that is false, in the sense of purposely untrue;

1 it is not necessary to conclude that a visa applicant is aware that information is purposely untrue, before PIC 4020 is engaged;

2 ...

25. The critical element coming from that decision is that while it is not determinative whether the visa applicant is aware that information is purposely untrue, the visa condition does require that the information is false in the sense of purposely untrue. In other words, there must be dishonesty by someone, whether by the applicant or someone else.
26. Buchanan J discussed my decision in *Vyas* in his judgment from [23]-[27]. His Honour, while qualifying the principle in *Vyas*, stated that he nevertheless accepted the basic premise in my decision, that the visa applicant need not be complicit in any falsehood. That was the principle relied upon by the Tribunal at [7] of its reasons and, accordingly, I find that the Tribunal did not fall into any error by relying upon my earlier decision.
27. The Tribunal found that the purported IELTS Certificate was a fabrication. It must follow that there was dishonesty by someone in producing that document. I conclude that the decision of the Tribunal is consistent with the decision of the Full Court in *Trivedi*, and no error is indicated.
28. Mr Chopra has failed to demonstrate that the Tribunal fell into any jurisdictional error in its decision.
29. The decision is, therefore, a privative clause decision and the application must be dismissed. I will so order.

30. In consequence of the dismissal of the application, the Minister seeks an order for costs fixed in the sum of \$4,900. Mr Chopra did not want to be heard on costs.
31. I will order that the applicant is to pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of \$4,900.

I certify that the preceding thirty-one (31) paragraphs are a true copy of the reasons for judgment of Judge Driver

Associate:

Date: 8 September 2014